84998-6
40247-5-II

No. ~~83037-1~~
(Appeal from Pierce County Superior Court No. 08 2 09228 9)

SUPREME COURT OF THE STATE OF WASHINGTON

ANGELA ERDMAN,

Plaintiff/Appellant,

v.

CHAPEL HILL PRESBYTERIAN CHURCH; MARK J. TOONE, individually; and the marital community of MARK J. TOONE and "JANE DOE" TOONE,

Defendants/Respondents.

BRIEF OF RESPONDENTS

VANDEBERG JOHNSON & GANDARA, LLP

William A. Coats, WSBA #4608
Daniel C. Montopoli, WSBA #26217
Attorneys for Respondents
1201 Pacific Avenue, Suite 1900
P. O. Box 1315
Tacoma, WA 98401-1315
Telephone: (253) 383-3791

ORIGINAL

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES

I. INTRODUCTION

This case involves a dispute between a high-ranking former employee and the Senior Pastor of the Chapel Hill Presbyterian Church, where tribunals of the Presbyterian Church have already rejected the claims of the former employee. Federal and state case law require that secular courts defer to the decisions of these ecclesiastical tribunals. Deference to these tribunals prevents a court from undermining a church's inherent autonomy to resolve disputes, an autonomy that is protected by the First Amendment. For this reason, the trial court's summary dismissal of claims presented to the ecclesiastical tribunal should be affirmed.

In addition, the First Amendment prohibits state and federal courts from asserting jurisdiction over disputes between a church and its ministerial employees—those employees whose primary functions serve the church's spiritual and pastoral mission. This "ministerial exception" has been applied to a wide range of jobs, from ministers to press secretaries and choir directors of churches. Here, the Plaintiff's former job as Executive for Stewardship serves the spiritual and pastoral mission of the Church. Thus, a secular court lacks jurisdiction to hear Plaintiff's case.

Also, the trial court properly dismissed Plaintiff's Washington's Law Against Discrimination claim because the WLAD specifically excludes nonprofit religious organizations from its definition of employer. The Washington Supreme Court has held that nonprofit religious employers are exempt from all provisions of the WLAD. As a result, the

trial court correctly held that Plaintiff's discrimination claim against Chapel Hill should be dismissed as a matter of law.

In addition, the trial court correctly limited discovery into the internal processes of an ecclesiastical tribunal of the Presbyterian Church. To hold otherwise would constitute an impermissible entanglement by a secular court into the judgments of a church in violation of the church's First Amendment rights.

For these reasons, the trial court's dismissal of Plaintiff's claims should be affirmed.

II. RESTATEMENT OF THE ISSUES

1. Whether the First Amendment and Washington case law require a court to defer to the decisions of ecclesiastical tribunals of hierarchical religious organizations, as in this case where an Investigative Committee of the Presbyterian Church rejected the claims advanced by Ms. Erdman.

2. Whether the First Amendment's prohibition against secular courts asserting jurisdiction over disputes between a church and its ministerial employees prevents this Court from asserting jurisdiction over a dispute between Chapel Hill and its former Executive for Stewardship, where a primary duty of the position is to facilitate the vision, goals and strategies of Chapel Hill.

3. Whether the trial court correctly limited discovery into the internal processes of an ecclesiastical tribunal where an in camera review

of the requested documents established that the documents were protected by the First Amendment.

III. COUNTERSTATEMENT OF THE CASE

A. Ms. Erdman Hired as the Executive for Stewardship of the Church.

Since June 2003, Plaintiff Angela Erdman has been an Elder of the Chapel Hill Presbyterian Church. Respondents' Supplemental Designation of Clerk's Papers ("Supp. CP") at 810. As an Elder, Ms. Erdman took ordination vows where she agreed to be bound by the disciplinary procedures of the Church and to seek reconciliation and resolve disputes in accordance with Church procedure. Supp. CP 810, 817-18.

In 2005, Ms. Erdman was hired by Chapel Hill Presbyterian Church as the Church's Executive for Stewardship. Her job duties included facilitating the development of the vision, goals, and strategies for the Church; providing strategic leadership; helping to make decisions regarding the financial and development strategies and goals of the Church; and creating a major donor development plan for the Church. Supp. CP 811, 819-20.

From 2005 to Spring 2007, Ms. Erdman's performance was excellent. Supp. CP 811. Ms. Erdman reported to the Senior Pastor, Dr. Mark Toone, who was responsible for evaluating her work. Supp. CP 811, 821-28.

Since 1987, Dr. Toone has been the Senior Pastor of the Church. Supp. CP 810. As Senior Pastor, Dr. Toone taught classes for Church

members dealing with theological, biblical, and historical topics. Periodically, these classes have been augmented by tours to locations of religious and historical significance. Supp. CP 811. For example, a class on the history of Israel might be supplemented by a tour of Israel for those class members who wished to participate. Dr. Toone typically uses personal vacation time to lead these tours. Supp. CP 811.

Usually, the tours have been announced in Church bulletins and informational meetings have occurred on Church property. Supp. CP 811. A private tour company provides a package deal for members who want to take the tour. Supp. CP 811. Members pay the tour company directly and the tour company compensates Dr. Toone, who then reports this income on his personal income tax return. Supp. CP 811.

Dr. Toone has been leading these religious tours for approximately 24 years. Supp. CP 811. Such tours are commonplace for many clergy. Supp. CP 811.

Approximately five years ago, Dr. Toone met with Elder Monte Hester and other leaders of the Church to review the business practices of the Church, including the educational tours led by Dr. Toone. Supp. CP 982. At that time, the Church leaders determined that the tours were consistent with the Church's mission, that they were being conducted properly and that Dr. Toone's practice of using personal study time to lead the tours was appropriate. Supp. CP 812, 982. In November 2007, the Church's governing body (a Board of Elders called the "Session")

emphasized that it has always considered these tours to be part of the Church's ministry. Supp. CP 812, 982.

B. Ms. Erdman Repeatedly Questioned the Propriety of the Tours Led by Dr. Toone.

In June 2007, Ms. Erdman questioned whether the tours led by Dr. Toone would jeopardize the Church's tax exempt status, believing that the tours might be considered an improper use of Church property. Supp. CP 812. Dr. Toone told Ms. Erdman that they should not address this issue until he returned from sabbatical later that summer. Supp. CP 812.

Ms. Erdman, however, ignored Dr. Toone's instruction and corresponded with the Church's accountant regarding the propriety of the tours. Supp. CP 812. In addition, she removed an announcement of an upcoming tour from a Church bulletin after Dr. Toone had approved the announcement and instructed that it appear in the bulletin. Supp. CP 812.

After Dr. Toone returned from sabbatical in September 2007, Ms. Erdman raised the issue of the tours again. Supp. CP 812. Dr. Toone assured her that these tours were consistent with the Church's mission, that these types of tours were a common ministry practice for many clergy, that the way the Church handled these tours was typical of the approaches taken by other churches, and that he was certain that the tours did not put the Church at risk. Supp. CP 812. Nevertheless, Dr. Toone asked Ms. Erdman to provide him with the sources that supported her concerns. Dr. Toone informed her that he would read this material and discuss the issue with his accountant and ask the accountant to discuss the

matter with the Church's accountant. Supp. CP 812. After doing that, Dr. Toone would make his decision regarding the tours. Until that time, Dr. Toone told Ms. Erdman that he would not change the long-standing practices of how these tours were handled and that the matter was "out of [her] hands." Supp. CP 812.

Dr. Toone proceeded to read the material provided by Ms. Erdman and to discuss the matter with his accountant. Supp. CP 813. The accountant assured Dr. Toone that the tours were being conducted properly and that they did not threaten the Church's tax exempt status. Supp. CP 813..

On October 16, 2007, Dr. Toone sent Ms. Erdman an email stating that he was satisfied that the tours were being handled appropriately and referencing the communication between his accountant and the Church's accountant. Supp. CP 813, 829. The email also stated that Dr. Toone "wanted to close the loop" on this issue with Ms. Erdman. Supp. CP 829.

Ms. Erdman, however, persisted in questioning the tours: She responded to Dr. Toone's October 16 email by asking again if she could discuss the tours with Dr. Toone. Supp. CP 813, 829. When Dr. Toone did not respond to this email, Ms. Erdman sent him another email the next day that again requested that they meet to discuss the Church tours. Supp. CP 813, 829.

After receiving Ms. Erdman's second email, Dr. Toone met with Ms. Erdman on October 17, 2007. Supp. CP 813. At that meeting, Dr. Toone emphatically told Ms. Erdman that the tours were proper, that

they did not jeopardize the Church's tax exempt status, that she should not concern herself with this matter anymore, that her continuing to question these tours was insubordination, and that she had unfairly impugned his reputation. Supp. CP 813. Ms. Erdman responded by accusing Dr. Toone of intimidation and she threatened to quit rather than follow his directives. Supp. CP 813. In an attempt to resolve this dispute, Dr. Toone suspended all promotional activity for the upcoming tour and agreed to immediately turn the matter over to the Session, the governing body for the Chapel Hill Presbyterian Church. Supp. CP 813.

C. A Session Committee Investigated Ms. Erdman's Claims and the Working Relationship Between Ms. Erdman and Dr. Toone.

Within hours after meeting with Ms. Erdman, Dr. Toone appointed a committee of Session members to review the educational tours and the conflict with Ms. Erdman. Supp. CP 813. Dr. Toone appointed the committee in accordance with the Presbyterian Church (U.S.A.)'s Book of Order[1] and Session Committee Principles. Supp. CP 813-14, 830-32.

The Session Committee consisted of four of the 12 Elders in the Session: Robert Gore, Rosemary Lukens, David Martin and Thomas Walter. Supp. CP 814, 997. Later, the Session Committee was expanded to include Monte Hester, an attorney and Elder in the Session. Supp. CP 814, 997. Dr. Toone agreed that he would abide by the decisions of the

---

[1] The Presbyterian Church (U.S.A.)'s Book of Order outlines the form of Church government, the Church's theology, and the member and officer discipline and conflict resolution processes. Supp. CP 810-11.

Session Committee, including stopping the educational tours if that was the recommendation of the Committee. Supp. CP 814, 997.

On October 18, 2007, the Committee met with Ms. Erdman to hear her concerns. Supp. CP 997.The Committee addressed the interpersonal issues between Ms. Erdman and Dr. Toone, hoping to resolve these issues. Supp. CP 995-98. In addition, the Committee began its review of the educational tours by seeking the opinions of experts. Supp. CP 998.

After having missed work since the October 17 meeting, Ms. Erdman requested a medical leave on October 22, 2007, complaining that she was too stressed to work. Dr. Toone granted the request. Supp. CP 814.

Unfortunately, the Committee's attempts at mediating the dispute between Ms. Erdman and Dr. Toone did not go well. Supp. CP 996. Because of her background in Human Resources, Session Committee member Lukens was chosen to act as mediator. Supp. CP 996. In meetings between Ms. Lukens, Ms. Erdman, and Dr. Toone, Ms. Erdman compared her situation to that of an "abused" woman being forced to work with her "abuser." Supp. CP 814, 996. The animosity expressed by Ms. Erdman towards Dr. Toone made it difficult for the two to work together in the future. Supp. CP 814, 996.

In November 2007, before the Session Committee had completed its investigation, Ms. Erdman's attorney contacted a Committee Member and threatened to damage the Church by publicizing Ms. Erdman's allegations unless the Church agreed to give Ms. Erdman a severance

package. Supp. CP 809. The Session Committee was shocked and dismayed by this threat. Supp. CP 809.

Subsequently, Ms. Erdman's attorney informed the Church's attorney that unless her client received a full year of severance pay, Ms. Erdman would return to work on December 3, 2007. Supp. CP 814. Given the unresolved conflict with Dr. Toone, the Church responded by placing Ms. Erdman on administrative leave with pay, pending resolution of the Church's investigation. Supp. CP 814.

Before the Session Committee had completed its investigation, Ms. Erdman filed a grievance against Dr. Toone with the Presbytery of Olympia in December 2007. Supp. CP 814, 998, 1000, 1002-11. The Presbytery of Olympia is the governing body for the area that encompasses the Chapel Hill Presbyterian Church. Supp. CP 814.

Ms. Erdman's complaint was filed in accordance with the Presbyterian Church (U.S.A.)'s Book of Order Section D-10.0100. Supp. CP 814, 833-40. The grievance contained references to alleged violations of the Book of Order and scripture by Dr. Toone. Supp. CP 814, 1000-01.

This grievance, which was sent to Session Committee members, two other employees of Chapel Hill, and the Clerk for the Presbytery of Olympia, also contained confidential information concerning a Church donor. Supp. CP 998, 1003-11. The Session Committee then asked to meet with Ms. Erdman, but she refused. Supp. CP 998, 1012. In refusing the offer to meet, Ms. Erdman stated incorrectly that she had made requests to meet with the Session, that she had been ignored by the Session and that

the Church's attorney had asked her to file a grievance. Supp. CP 998, 1012.

The Session Committee issued its report on December 27, 2007. Supp. CP 998, 1013-17. The report recommended that Ms. Erdman be terminated immediately. Supp. CP 998, 1013. The Session Committee was particularly upset by Ms. Erdman's implied threats that unless the Church gave into her demand for a year's severance, there would be undesirable consequences for the Church. Supp. CP 998.

The Session Committee concluded that Ms. Erdman "had failed to follow the scriptural teaching concerning our relationships within the body of Christ." Supp. CP 1015. The Committee also found that Ms. Erdman had violated her ordination vows contained in the Book of Order. Supp. CP 1016-17.

In addition, the Session Committee concluded that the allegations in Ms. Erdman's December grievance were inaccurate and violated the Book of Order. Supp. CP 998. The Committee also found that Ms. Erdman's December 13 response included false and misleading statements concerning her alleged efforts at meeting with the Committee and being asked to file a grievance. Supp. CP 998-99. The Session Committee stated that it believed that Ms. Erdman had previously misrepresented the facts underlying the educational tours to the Church's accountant by stating that the tours were not part of the Church's ministry. Supp. CP 999. The Session Committee concluded that the tours were being conducted properly and that Dr. Toone had acted appropriately.

Supp. CP 999, 1016. Finally, the Committee concluded that there was no evidence of unlawful harassment by Dr. Toone. Supp. CP 983, 999, 1016.

Because Ms. Erdman had improperly distributed disparaging and derogatory emails that contained false statements and confidential information, and because she threatened to dishonor the Church in an attempt to receive a severance package, the Session Committee recommended that she be terminated. Supp. CP 999, 1013. By letter dated December 28, 2007, Ms. Erdman was fired, effective December 31, 2007. Supp. CP 815, 841.

D. The Investigative Committee of the Presbytery of Olympia Rejected Ms. Erdman's Allegations.

In early January 2008, Ms. Erdman resubmitted her complaint with the Presbytery of Olympia (using the proper form, called "Form No. 26"), again in accordance the Book of Order. Supp. CP 815, 842-46. Ms. Erdman's Form No. 26 grievance accused Dr. Toone of violating scripture and church law, misusing church possessions for personal gain, and verbally abusing and harassing Ms. Erdman. Supp. CP 815, 842-46. In her complaint to the Presbytery, Ms. Erdman also alleged that "significant portions" of the Session Committee's report were "inaccurate and reflect bearing of false witness and distortion of the truth." Supp. CP 845.

The Investigative Committee spent several months examining Ms. Erdman's allegations. Supp. CP 815, 848. In its examination, the Investigative Committee conducted several interviews with witnesses and evaluated numerous records and documents. Supp. CP 815, 848.

For example, Session Committee Member Monte Hester sent the Investigative Committee several letters discussing whether the educational tours and the actions of Dr. Toone posed a risk to the Church's tax exempt status. Supp. CP 983, 984-85. As Mr. Hester stated, all of the letters concluded "that Pastor Toone's tour involvement has not created and does not create any risk to the Church's [exempt] status with either the Washington State Department of Revenue or the Internal Revenue Service." Supp. CP 983, 985.

On May 27, 2008, the Investigative Committee of the Olympia Presbytery declined to file charges against Dr. Toone, concluding that Ms. Erdman's allegations "cannot be reasonably proved." Supp. CP 815, 848. Pursuant to the Book of Order, Ms. Erdman had the right to appeal the decision of the Investigative Committee. Supp. CP 815, 837. Ms. Erdman, however, declined to appeal. Supp. CP 815.

E. The Trial Court Dismissed Ms. Erdman's Claims That Were Based Upon Allegations Presented to the Investigative Committee, Along with her Outrage and Washington State Discrimination Claims.

Instead of appealing the Investigative Committee's decision, Ms. Erdman filed suit against the Church and Dr. Toone on June 12, 2008. The Complaint alleged negligent retention, negligent supervision, sex and religious discrimination, intentional infliction of emotional distress, negligent infliction of emotional distress, wrongful discharge, and wrongful termination in violation public policy. CP 3-13.

After being served with Defendants' motion for summary judgment in December 2008, Ms. Erdman moved to amend her complaint to include a claim for violation of 42 U.S.C § 2000e-2 ("Title VII"). CP 96-98. The trial court granted Plaintiff's motion, but reserved the right of the Defendants to seek fees and costs because of the late timing of the Plaintiff's motion to amend. CP 165-66.

On January 14, 2009, Ms. Erdman sought an order directing the Presbytery of Olympia to comply with her subpoena to produce documents related to the internal investigation conducted by the Presbytery. CP 75-81. The Defendants and the Presbytery objected to the motion, contending that the requested discovery would interfere with a church's inherent and constitutionally-protected authority to resolve matters of church discipline in its ecclesiastical tribunals. CP 126-31.

After conducting an in camera review, the trial court agreed that the documents were protected by the First Amendment. CP 180. The trial court stated that its review established that the Presbytery of Olympia had considered each of the allegations contained in Ms. Erdman's Form No. 26 grievance. CP 180. For these reasons, and because the Plaintiff had failed to demonstrate the required level of necessity, the trial court held that the Presbytery did not have to produce the documents. CP 181.

On January 30, 2009, the Defendants filed a revised summary judgment motion which included Ms. Erdman's Title VII claim. CP 200-28. The Defendants' motion primarily contended that the trial court must defer to the decisions of the ecclesiastical tribunals of the

Presbyterian Church, that the court lacked jurisdiction to resolve a dispute between the Church and a ministerial employee, and that Washington's Law Against Discrimination (WLAD) specifically excludes nonprofit religious organizations. The Defendants also offered additional grounds for dismissing Ms. Erdman's other claims (negligent infliction of emotional distress, outrage, wrongful termination, and unlawful withholding of wages). CP 221-28.

On March 27, 2009, the trial court partially granted the Defendants' summary judgment motion. CP 726-28. The trial court dismissed Plaintiff's WLAD and outrage claims, as well as Plaintiff's claims that were based upon facts raised in Ms. Erdman's Form No. 26 grievance to the Presbytery of Olympia. Thus, Ms. Erdman's claims that were based entirely upon facts raised in the Form No. 26 grievance, such as Negligent Retention, Negligent Supervision, Wrongful Discharge, and Wrongful Termination in Violation of Public Policy, were dismissed completely. CP 726-28.

However, other claims that were based partially on Ms. Erdman's Form No. 26 grievance and partially on events that allegedly occurred after the grievance—such as Ms. Erdman's Retaliation, Negligent Infliction of Emotional Distress, and Title VII claims—were dismissed only to the extent that these claims were based upon facts raised in Ms. Erdman's Form No. 26 grievance to the Presbytery of Olympia. In addition, claims that arose after the Form No. 26 grievance were left standing. CP 726-28.

The Defendants subsequently moved for the summary judgment dismissal of these remaining claims. Supp. CP 1048-60. Before Defendants' second motion could be heard, however, the Plaintiff voluntarily dismissed her remaining claims. CP 799. Ms. Erdman subsequently filed her notice of appeal challenging the trial court's summary judgment order and the orders limiting discovery of the Presbytery of Olympia. CP 800.

IV. SUMMARY OF THE ARGUMENT

As elder in the Church, Ms. Erdman vowed to be governed by the Church's polity and to abide by its discipline. Consistent with these vows, Ms. Erdman filed a grievance with the Presbytery of Olympia. In her grievance, Ms. Erdman accused Dr. Toone of violating scripture and church law, including his ordination vows and his responsibilities as outlined in the Book of Order. Ms. Erdman's grievance also accused him of harassment and retaliation. An Investigative Committee of the Presbytery of Olympia investigated and ultimately rejected these allegations.

Federal and state law require secular courts to defer to decisions of ecclesiastical tribunals of hierarchically-structured churches, such as the Presbyterian Church. This deference prevents a court from undermining a church's inherent autonomy to resolve disputes, an autonomy that is protected by the First Amendment. As the U.S. Supreme Court has held, civil courts must accept the decisions of ecclesiastical tribunals on matters

of discipline, faith, internal organization, or ecclesiastical rule, custom or law. Here, Ms. Erdman accused Dr. Toone of violating scripture and church law, including specific provisions of the Presbyterian Church's Book of Order, and of violating his ordination vows and his responsibilities as pastor. Because Ms. Erdman's grievance concerned matters of discipline, faith, internal organization, or ecclesiastical rule, custom or law, the trial court correctly deferred to the decision of the Investigative Committee.

In addition, the First Amendment prohibits state and federal courts from asserting jurisdiction over disputes between a church and its employees whose primary functions serve the church's spiritual and pastoral mission. This "ministerial exception" has been applied to a wide range of jobs, from ministers to press secretaries and choir directors of churches. Here, Ms. Erdman's former job as Executive for Stewardship serves the spiritual and pastoral mission of the Church. Thus, a secular court lacks jurisdiction to hear her case.

Furthermore, Washington's Law Against Discrimination contains a specific exemption for religious employers. Ms. Erdman's challenge to the constitutionality of this exemption is not well-taken because she has failed to serve the Attorney General. In addition, Ms. Erdman is asking this Court to declare the exemption unconstitutional and then apply the rest of the WLAD to the Chapel Hill Presbyterian Church. Washington courts, however, cannot severe a clause from a statute if doing so would broaden the statute to include parties specifically excluded by the legislature,

without striking down the entire statute. Furthermore, the exemption for religious employers in the WLAD passes the rational basis test. Thus, the trial court correctly dismissed Plaintiff's WLAD claim.

Finally, the trial court, after conducting an in camera review, correctly prevented discovery into the thought processes of the Investigative Committee of the Presbytery of Olympia. To hold otherwise would entangle secular courts with decisions of ecclesiastical tribunals, an entanglement that would violate the First Amendment rights of the Presbytery.

V. ARGUMENT

A. Standard of Review

An appellate court engages in de novo review of a trial court's grant of summary judgment and may affirm on any basis the record supports. *Graff v. Allstate Ins. Co.*, 113 Wn. App. 799, 802, 54 P.3d 1266 (2002). Summary judgment shall be granted if there is no genuine issue concerning any material fact and the moving party is entitled to judgment as a matter of law. CR 56(c); *Doherty v. Metro. Seattle*, 83 Wn. App. 464, 468, 921 P.2d 1098 (1996). The initial burden under CR 56(c) is on the moving party to prove that no issue is genuinely in dispute. *Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989). Thereafter, the burden shifts to the non-moving party to establish that a triable issue exists. *Schaff v. Highfield*, 127 Wn.2d 17, 21, 896 P.2d 665 (1995). Summary judgment is appropriate if reasonable persons could reach only

one conclusion from all of the evidence. *Vallandigham v. Clover Park Sch. Dist. No. 400,* 154 Wn.2d 16, 26, 109 P.3d 805 (2005).

Regarding pretrial discovery orders, the standard of review is a manifest abuse of discretion. *Demelash v. Ross Stores, Inc.*, 105 Wn. App. 508, 519, 20 P.3d 447 (2001). A trial court abuses its discretion when its order is manifestly unreasonable or based on untenable grounds. *See, e.g., Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 339, 858 P.2d 1054 (1993).

B. Ms. Erdman Has Failed To Assign Error to the Trial Court's Rulings.

The Rules of Appellate Procedure require appellants to assign error to each trial court action the appellant claims is erroneous. RAP 10.3(a)(4) and RAP 10.3(g). The rules add that these assignments of error should be linked to the appellant's legal issues. RAP 10.3(a)(4). This Court has the discretion to ignore an appellant's failure to comply with RAP 10.3 when the court is not inconvenienced nor the respondent prejudiced by the failure. *State v. Olson*, 126 Wn.2d 315, 323, 893 P.2d 629 (1995).

Here, Ms. Erdman's brief fails to assign error to any of the trial court's rulings. This failure makes the Respondents' task more difficult because of the complexity of the trial court's order partially granting Defendants' summary judgment motion. In that order, the trial court:

- Dismissed outright Ms. Erdman's outrage claim and her Washington Law Against Discrimination claim;

- Dismissed completely Ms. Erdman's Negligent Retention, Negligent Supervision, Wrongful Discharge, and Wrongful Termination in Violation of Public Policy claims because these claims were included in Ms. Erdman's Form No. 26 grievance to the Presbytery of Olympia;
- Partially dismissed Ms. Erdman's Retaliation, Negligent Infliction of Emotional Distress, and Title VII claims to the extent that these claims were based upon facts raised in Ms. Erdman's Form No. 26 grievance.
- Let stand Ms. Erdman's claims that were based on allegations occurring after her Form No. 26 grievance.[2]

CP 726-29 (Order Partially Granting And Partially Denying Defendants' Revised Motion For Summary Judgment, dated March 30, 2009).

Based upon the arguments raised in Appellant's brief, the Respondents believe that Ms. Erdman is challenging only the dismissal of her claims that were based upon allegations in her Form No. 26 grievance to the Presbytery of Olympia, the dismissal of her WLAD claim and the trial court's rulings limiting discovery as to the documents and internal thought processes of the Investigative Committee of Presbytery of Olympia. Thus, Respondents' brief addresses only these issues.

---

[2] These remaining claims—Plaintiff's unlawful withholding of wages claim and her Retaliation, Negligent Infliction of Emotional Distress, and Title VII claims that were based upon allegations that occurred after her Form No. 26 grievance—were subsequently withdrawn by Ms. Erdman. CP 798-99.

C. Applying *Milivojevich* and *Elvig*, the Trial Court Correctly Deferred to Decisions Made by Tribunals of the Presbyterian Church.

1. The U.S. Supreme Court Requires Deference to Decisions of Ecclesiastical Tribunals of Hierarchical Religious Organizations on Matters of Discipline, Faith, or Ecclesiastical Law.

The United States Supreme Court has held that the U.S. Constitution requires that courts defer to the decisions of ecclesiastical tribunals of hierarchical religious organizations:

> [T]he First and Fourteenth Amendments permit hierarchical religious organizations to establish their own rules and regulations for internal discipline and government, and to create tribunals for adjudicating disputes over these matters. When this choice is exercised and ecclesiastical tribunals are created to decide disputes over the government and direction of subordinate bodies, the Constitution requires that civil courts accept their decisions as binding upon them.

Serbian Eastern Orthodox Diocese for U. S. of America and Canada v. Milivojevich, 426 U.S. 696, 724-25, 96 S. Ct. 2372 (1976).

In *Milivojevich*, the U.S. Supreme Court held that the First Amendment barred a state court from invalidating, as arbitrary, the decision of an ecclesiastical tribunal. The Court stated:

> **[C]ivil courts are bound to accept the decisions of the highest judiciaries of a religious organization of hierarchical polity on matters of discipline, faith, internal organization, or ecclesiastical rule, custom, or law.** For civil courts to analyze whether the ecclesiastical actions of a church judicatory are in that sense "arbitrary" must inherently entail inquiry into the procedures that canon or ecclesiastical law supposedly requires the church judicatory to follow, or else in to the substantive criteria by

> which they are supposedly to decide the ecclesiastical question. But this is exactly the inquiry that the First Amendment prohibits; recognition of such an exception would undermine the general rule that religious controversies are not the proper subject of civil court inquiry, and that **a civil court must accept the ecclesiastical decisions of church tribunals as it finds them.**

Milivojevich, 426 U.S. at 713 (emphasis added).[3]

Applying *Milivojevich*, several federal courts have held that the First Amendment bars a plaintiff's Title VII claim. *See, e.g., Young v. Northern Illinois Conference Of United Methodist Church*, 21 F.3d 184 (7th Cir. 1994). In *Young*, the Seventh Circuit stated that:

> *Milivojevich*, read in its entirety, holds that civil court review of ecclesiastical decisions of church tribunals, particularly those pertaining to the hiring or firing of clergy, are in themselves an "extensive inquiry" into religious law and practice, and hence forbidden by the First Amendment.

21 F.3d at 187. For this reason, the Seventh Circuit affirmed the summary judgment dismissal of a plaintiff's race and sex discrimination claims brought under Title VII. *Young*, 21 F.3d at 187-88.

Thus, under *Milivojevich*, "civil courts are bound to accept the decisions of the highest judicatories of a religious organization of hierarchical polity on matters of discipline, faith, internal organization, or ecclesiastical rule, custom, or law," 426 U.S. at 713.

---

[3] While rejecting arbitrariness as a grounds for overturning the decision of an ecclesiastical tribunal, *Milivojevich* did not address whether the "narrow rubrics" of fraud or collusion might allow for "marginal review" because those issues were not before the Court. 426 U.S. at 713 n.7.

2. Washington Courts Also Defer to Decisions by Tribunals of Hierarchically-Organized Churches

Similarly, Washington courts must defer to decisions rendered by tribunals of hierarchically-organized churches. *Elvig v. Ackles,* 123 Wn. App. 491, 98 P.3d 524 (2004). In *Elvig*, a female minister of a Presbyterian church accused the church's senior minister of sexual harassment. 123 Wn. App. at 493. The plaintiff's claims of sexual harassment against the senior minister were referred to an Investigative Committee composed of members of a different Presbyterian church. *Elvig,* 123 Wn. App. at 493-94. The Investigative Committee examined the matter and concluded that charges would not be filed against the senior minister. *Id.* at 494. The plaintiff in *Elvig* appealed this decision to the Permanent Judicial Commission of the Presbytery, which affirmed the decision of the Investigative Committee. *Id.*

Subsequently, the plaintiff filed suit in state court against the senior minister, the church, and the presbytery. *Elvig,* 123 Wn. App. at 494. The plaintiff alleged sexual harassment, retaliation, aiding and abetting, and defamation by the senior minister; retaliation and negligent supervision by the church; and retaliation, aiding and abetting, and negligent supervision by the presbytery. *Id.* at 495. Following defendants' motion for summary judgment, the trial court dismissed all of plaintiff's claims except for defamation, which was then voluntarily withdrawn by the plaintiff. *Id.* at 495.

In upholding the summary judgment dismissal, the *Elvig* court noted that Washington courts may not adjudicate disputes that have been resolved by tribunals of hierarchically-organized churches:

> In Washington, civil courts may adjudicate church-related disputes only if the dispute does not involve ecclesiastical or doctrinal issues. [footnote omitted] "The First Amendment does not provide churches with absolute immunity to engage in tortious conduct. So long as liability is predicated on secular conduct and does not involve the interpretation of church doctrine or religious beliefs, it does not offend constitutional principles." **But if the church accused of wrongdoing is a member of a hierarchically-organized church that has ecclesiastical judicial tribunals, civil courts must defer to the highest church tribunal's resolution of the matter, despite the fact that the dispute could be resolved by a civil court.**

Elvig, 123 Wn. App. at 496 (footnotes omitted) (emphasis added).

In addition, *Elvig* stated that it was "undisputed that the Presbyterian Church is a hierarchically-structured church." *Elvig*, 123 Wn. App at 497 n.15. This hierarchal structure consists of governing bodies called session, presbytery, synod, and General Assembly. Supp. CP 815.

The *Elvig* court then discussed the ecclesiastical tribunal process of the Presbyterian Church:

> The Presbyterian Church is governed by its Book of Order which outlines the form of church government, the church's theology, and the member discipline and conflict resolution processes. The Book of Order's "Rules of Discipline" section encourages people to attempt to resolve their disputes among themselves through conciliation and mediation. If this resolution is not possible, disputes are to be resolved according to the judicial process outlined by the Book of Order. First, the complainant must submit a

> written statement of the alleged offense, along with supporting information, to the appropriate church official. The official then refers the complaint to an Investigative Committee. This Committee examines all relevant documents and interviews all relevant witnesses before determining whether charges should be filed.
>
> If the Committee recommends filing charges, the Prosecuting Committee prosecutes the case on the church's behalf and a Permanent Judicial Commission conducts a formal trial. But if the Committee does not recommend filing charges, the complainant may appeal to the Permanent Judicial Commission. If the Commission sustains the appeal, a new Investigative Committee is appointed. But if it does not, the matter is concluded. In Elvig's case, an Investigative Committee conducted an inquiry and unanimously determined that charges would not be filed against Ackles. The Permanent Judicial Commission concurred, thus concluding the case.

Elvig, 123 Wn. App. at 498.

Next, the *Elvig* court reasoned that a trial court could not question the decisions of the Presbyterian tribunals without impermissibly undermining the Church's authority:

> Here, Elvig's case centers on the claim that church authorities learned of the sexual harassment but failed to discipline Ackles and instead precluded Elvig from seeking other work. But the church declined to discipline Ackles because its Investigative Committee and Permanent Judicial Commission decided that insufficient evidence existed to file a charge. And the church's Book of Order prohibits allowing a minister to transfer while charges are pending. Thus Elvig's negligent supervision and aiding and abetting claims would require a secular court to examine decisions made by ecclesiastical judicial bodies, and her retaliation claims would require a court to question and interpret the transfer rule in the church's Book of Order. **We can do neither without effectively undermining the church's inherent autonomy.**

Elvig, 123 Wn. App. at 498-99 (emphasis added).

As a result, the Court of Appeals affirmed the trial court's dismissal of the plaintiff's claims against the presbytery, the church, and the senior minister:

> We thus affirm the trial court's order dismissing Elvig's claims against Nelson [the Executive Presbyter], the church, and the presbytery. We must also affirm the ruling dismissing Elvig's sexual harassment, retaliation, and aiding and abetting claims against Ackles [the senior minister]. It would be counterintuitive to hold that a court may not interfere with church doctrine and ecclesiastical decision-making but that it may examine claims made against individual religious authorities. Were we to do so, we would be permitting civil authorities to question and interpret church doctrine as surely as if we had allowed the suit to proceed against the church itself.

Elvig, 123 Wn. App. at 499. In deferring to the ecclesiastical tribunals, the court noted that Elvig had taken vows to be bound by the Presbytery's judgment. *Elvig*, 123 Wn. App. at 501 n.21 ("In her vows, Elvig agreed to accept the Presbytery's judgment in matters such as this.")[4]

3. Ms. Erdman Has Vowed To Be Governed By the Presbyterian Church.

Like the plaintiff in *Elvig*, Ms. Erdman also took ordination vows to be bound by the Presbytery's judgment. Supp. CP 810, 817-18. For example, Ms. Erdman vowed "to be governed by [the Church's] polity"

---

[4] Specifically, Elvig took a formal vow to be "governed by our Church's polity, and to abide by its discipline." *Elvig v. Calvin Presbyterian Church*, 375 F.3d 951, 970 (9th Cir. 2004) (J. Trott, dissenting) (*quoting* Book of Order G-14.0405(b)).

and "to abide by its discipline." Supp. CP 810, 817 (Book of Order G-14.0207(e)).

Consistent with these vows, Ms. Erdman filed her Form No. 26 grievance acknowledging that her complaint is "under the jurisdiction of the Olympia Presbytery." CP 843. Furthermore, Ms. Erdman's grievance involved matters of discipline and ecclesiastical law. Indeed, her grievance accused Dr. Toone of violating scripture and church law:

> I believe Mark Toone's conduct and actions violate scripture as found in Exodus 22:3b & 23:1, Leviticus 6:2-5 & 19:15-16, Matthew 5:25, 18:15-17 & 20:28, Mark 10:19, Luke 16:2, Romans 13:1-7, Ephesians 4:3 & 4:25-32 & 5:11-12 & 15-17, 1 Corinthians 4:2 & 6:1, 2 Corinthians 4:2, 1 Timothy 6:10, 2 Timothy 3:2-7, Titus 1:7-8, Hebrews 10:26-27, James 3:1, 1 Peter 1:13-15 & 5:2-3 and 1 John 1:6.
>
> I believe Mark Toone's conduct and actions are inconsistent with the teachings found in The Book of Confessions (PCUSA) 3.24, 4.004, 4.106, 4.107, 4.110, 4.112, 5.159, 5.155, 5.160, 5.165, 5.244, 5.258, 6.085, 6.086, 6.111, 7.063, 7.073, 7.075, 7.076, 7.239, 7.240, 7.244-6, 7.250-2, 7.253-5, 7.261.
>
> I believe Mark Toone violated his ordination vows, specifically as found in The Book of Order G-14.0405b: items 4, 5, 6, 7, 8 and 9.
>
> I believe Mark Toone violated his responsibilities as outlined in The Book of Order G-1.0304, G-3.0200, G-6.0106, G-10.0102: n *(which also include possible violations of Chapel Hill Session Policies EL-1, EL-2a, EL-2b, EL-2f, EL-2g, EL-2h, GP-2d, GP-4, SSPL-2a and Chapel Hill Employee Handbook provisions against harassment (pages 5 & 6)) and o, and G-14.0103*

Supp. CP 845-46. The grievance also accused Dr. Toone of harassment and retaliation. Supp. CP 843-45.

Moreover, when Counsel for Chapel Hill asked Ms. Erdman's attorney for evidence to support Ms. Erdman's claims of harassment, the Plaintiff declined to provide any evidence because "jurisdiction in this matter, per the Book of Order, was established with the Presbytery of Olympia." Supp. CP 1036, 1040-41. Ms. Erdman also declined to meet with the Session Committee for the same reason. Supp. CP 998, 1012.

The report of the Session Committee also supports the conclusion that Ms. Erdman's allegations involved matters of Church discipline, faith, and ecclesiastical law. The report, for example, detailed specific sections of the Book of Order that were violated by Ms. Erdman:

> [W]e, the committee, believe that Angela Erdman, an elder in the Presbyterian Church, has also violated her vows of ordination in the following ways:
>
> 1. Angela Erdman violated G-14.02707: d by her failure to keep her vow to *fulfill her office in obedience to Jesus Christ, under the authority of Scripture, and to be continually guided by our confessions.*
>
> 2. Angela Erdman violated G-14.02707: e by her failure to keep her vow to *be governed by our church's polity, and to abide by its discipline and to be a friend among her colleagues in ministry subject to the ordering of God's Word and Spirit.*
>
> 3. Angela Erdman violated G: 1402707: f by her failure to keep her *vow to seek to follow the Lord Jesus Christ, love her neighbors, and work for the reconciliation of the world.*

> 4. Angela Erdman violated G: 142707: g by her failure to keep her vow to *further the peace, unity, and purity of the church.*
>
> 5. Angela Erdman violated G: 14.020: h by her failure to keep her vow to *seek to serve the people with love.*
>
> 6. Angela Erdman violated G: 14.0207: I by her failure to keep her vow to *try to show the love and justice of Jesus Christ.*
>
> 7. Angela Erdman violated D: 1.10103 by disregarding her Biblical duty of church people to *"come to terms quickly with your accuser while on your way to Court . . . Matthew 5:25.*
>
> Angela Erdman's conduct and actions clearly are inconsistent with the teachings found in The Book of Confessions (PCUSA) 7.245 (lines 17-25) and 7.254 and 7.255.

Supp. CP 1016-17. The Session Committee also concluded that Ms. Erdman "failed to follow the scriptural teaching concerning our relationships within the body of Christ as found in Matthew 5:25, Ephesians 4:3, . . ." Supp. CP 1015.

The similarities between this case and *Elvig* are striking. Both cases involved claims of sexual harassment and retaliation against a senior Presbyterian minister and negligent supervision against a Presbyterian church. In both cases, the plaintiffs took vows to be governed by the Presbyterian Church and to abide by its discipline. And in both cases, an ecclesiastical tribunal of the Presbyterian church investigated and rejected the plaintiff's claims.

Given these similarities, the trial court correctly held that *Elvig* requires the dismissal of Ms. Erdman's claims that were presented to the Presbytery of Olympia. CP 727-28, RP 4-5. To hold otherwise would require a court to examine decisions made by the Investigative Committee. Because this examination would undermine the Presbyterian Church's inherent authority, this Court should apply the reasoning of *Elvig* and *Milivojevich* and affirm the trial court.

4. Because Ms. Erdman's Allegations Involved Matters of Church Discipline, Faith and Law, Washington Courts Must Defer to the Investigative Committee of the Presbyterian Church.

In the trial court, Ms. Erdman primarily ignored *Elvig* and instead argued that this case should be governed by the "neutral principles of law" standard found in *Jones v. Wolf*, 443 U.S. 595, 99 S. Ct. 3020, 61 L.Ed.2d 775 (1979). CP 690. Ms. Erdman even claimed that: "The 'neutral principles of law' method of reviewing a dispute has never been rejected, and any assertion otherwise would essentially abandon reason." CP 690 at *ll.* 25-26.

Washington courts, however, have rejected the neutral principals of law approach for decisions rendered by ecclesiastical tribunals of hierarchal churches. *Organization for Preserving Constitution of Zion Lutheran Church of Auburn v. Mason*, 49 Wn. App. 441, 447, 743 P.2d 848 (1987). As the *Mason* court explained: Washington courts have rejected the neutral principles approach in favor of polity:

> The polity approach focuses upon the organizational structure of the church in question to determine whether the local church is congregational (independent) or whether it is a subordinate unit of a hierarchical organization. [citation omitted] . . . [W]hen the local church is a subordinate member of some general church organization in which there are superior ecclesiastical tribunals, the court must defer to and enforce a decision of the highest church tribunal that has ruled on the question. [citation omitted]
>
> . . .
>
> When the Washington Supreme Court had the opportunity to rule upon a church property dispute, **the court expressly rejected the neutral principles method and, instead, reaffirmed the polity approach** . . . . [citing *Presbytery of Seattle, Inc. v. Rohrbaugh*, 79 Wn.2d 367, 485 P.2d 615 (1971)] Thus, the threshold issue in this jurisdiction, at least when a property dispute is involved, is whether the church in question is hierarchically or congregationally organized. **We see no logical reason why a different approach should be used to determine when the civil courts have jurisdiction over religious disputes not involving property.**

Mason, 49 Wn. App. at 446-47 (citations omitted) (emphasis added).[5] *See also Southside Tabernacle v. Pentecostal Church of God, Pacific Northwest Dist., Inc.*, 32 Wn. App. 814, 820-21, 650 P.2d 231 (1982) (noting that the Washington Supreme Court in *Rohrbaugh* rejected the neutral principles approach); *Cf. S.H.C. v. Lu*, 113 Wn. App. 511, 521-23, 54 P.3d 174 (2002) (noting existence of "neutral principles" analysis

---

[5] In *Mason*, the court held that jurisdiction existed to hear the dispute because the Zion Lutheran Church was an independent congregation and not a member of a hierarchically-organized church. *Mason*, 49 Wn. App. at 447-49.

without reference to Washington law but declining to apply the analysis because doing so would violate First Amendment rights of a Buddhist Temple).

The polity analysis, or deference to tribunals of hierarchically-organized churches, is the approach applied by *Elvig* and by the trial court in this case.

In her Appellate Brief, Ms. Erdman acknowledges the polity approach, but claims that her allegations were based on secular conduct. App. Br. at 22, 27-30. Ms. Erdman's assertion that this case involves secular matters is undermined by the plain text of her Form No. 26 grievance.

In her Form No. 26 grievance, Ms. Erdman:

- Acknowledged that her grievance was "under the jurisdiction of the Olympia Presbytery. Supp. CP 843.
- Claimed that Dr. Toone's conduct violated specific sections of Exodus, Leviticus, Matthew, Mark, Luke, Romans, Ephesians, Corinthians, Timothy, Titus, Hebrews, James, Peter, and John. Supp. CP 845.
- Alleged that Dr. Toone's conduct violated specific sections of the Book of Confessions of the Presbyterian Church. Supp. CP 845.
- Claimed that Dr. Toone's conduct violated his ordination vows as found in specific sections of the Book of Order of the Presbyterian Church. Supp. CP 845.

- Claimed that Dr. Toone had violated his responsibilities as outlined in specific sections of The Book of Order. Supp. CP 845.

By itself, Ms. Erdman's grievance establishes that this case involves matters of Church discipline, faith, and ecclesiastical law. The Investigative Committee of the Olympia Presbytery investigated these accusations and determined that they could not be proven. Supp. CP 848.

In addition, Ms. Erdman took ordination vows "to be governed by [the Church's] polity" and "to abide by its discipline." Supp. CP 810, 817-18. Because an ecclesiastical tribunal of the Presbyterian Church has ruled on matters of church discipline, faith, and ecclesiastical law, Washington courts must defer.

D. The Ministerial Exception Prohibits Secular Courts From Asserting Jurisdiction Over Ms. Erdman's Claims.

In addition to deferring to decisions of church tribunals, the *Elvig* court noted that "civil courts may not adjudicate matters involving a church's selection of its spiritual leaders." *Elvig*, 123 Wn. App. at 496-97. This "ministerial exception" was adopted by Washington in *Gates v. Seattle Archdiocese*, 103 Wn. App. 160, 10 P.3d 435 (2000), *review denied,* 142 Wn.2d 1026, 21 P.3d 1149 (2001).

In *Gates,* a pastoral associate sued the Roman Catholic Archdiocese for breach of an employment contract, claiming that the church's pastor had breached the contract by requiring the pastoral associate to do more work than he had agreed to perform. *Gates*, 103 Wn. App. at 161. On appeal, the *Gates* court held that the First Amendment

barred the trial court from asserting jurisdiction over the pastoral associate's claim. *Gates*, 103 Wn. App. at 169.

The *Gates* court explained that the First Amendment prevents secular courts from asserting jurisdiction over disputes between a church and its minister:

> The central issue is whether the superior court has jurisdiction to hear the dispute. The First Amendment provides, in part, that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof". [citation omitted] Our courts have interpreted this amendment to prohibit a secular court from asserting jurisdiction over a controversy when doing so would entangle the court in matters of church doctrine and practice. [citation omitted] Controversies touching the relationship between a church and its minister are normally avoided by secular courts because the "introduction of government standards to the selection of spiritual leaders would significantly, and perniciously, rearrange the relationship between church and state."

Gates, 103 Wn. App. at 166 (citation omitted). Because the ministerial exception applied, the court lacked jurisdiction to hear the case. *Gates,* 103 Wn. App. at 168 ("Gates cannot prove his claims . . . without having the court entangle itself in matters of church doctrine and practice. His complaint was properly dismissed on summary judgment for lack of jurisdiction.")

In addition, the *Gates* court noted that the ministerial exception "applies not just to ordained clergy, but to all employees of a religious institution whose primary functions serve the church's spiritual and pastoral mission." *Gates,* 103 Wn. App. at 166. More recently, another

Washington court applied the ministerial exception to prohibit the constructive discharge claim of a former Director of Evangelization for a church. *Fontana v. Diocese of Yakima*, 138 Wn. App. 421, 57 P.3d 443 (2007), *review denied*, 163 Wn.2d 1004 (2008).

In *Fontana*, the plaintiff disagreed with how a bishop handled the discovery of pictures of naked adolescent boys on another priest's computer. 138 Wn. App. at 424. After the plaintiff expressed his dissatisfaction to the bishop, the plaintiff alleged that his working conditions deteriorated and that he was forced to resign. *Fontana*, 138 Wn. App. at 425. After the plaintiff filed suit alleging a constructive discharge, the trial court granted the defendants' motion to dismiss for lack of jurisdiction because the plaintiff's job was "ministerial." *Id.*

On appeal, the *Fontana* court noted that the key issue was whether the plaintiff's job functioned to advance the spiritual and pastoral mission of the church. *Fontana*, 138 Wn. App. at 426. Because the plaintiff's job was considered "ministerial," the *Fontana* court agreed that the trial court lacked subject matter jurisdiction to hear the constructive discharge claim:

> [W]e conclude Mr. Fontana's position at the Diocese was ministerial. Thus, the ministerial exception barred Mr. Fontana's claim. Therefore, the trial court properly dismissed his complaint for lack of subject matter jurisdiction.

Fontana, 138 Wn. App. at 426. As the *Fontana* and *Gates* courts have stated, the key issue in applying the ministerial exception is whether the employee's position serves the church's spiritual and pastoral mission.

Similarly, federal courts have held that the ministerial exception also bars the employment discrimination claims of ministerial employees. *See e.g. Hollins v. Methodist Healthcare, Inc.*, 474 F.3d 223, 226 (6th Cir. 2007) ("In order for the ministerial exception to bar an employment discrimination claim, the employer must be a religious institution and the employee must have been a ministerial employee."); *Rayburn v. General Conference of Seventh-Day Adventists*, 772 F.2d 1164 (4th Cir. 1985) (ministerial exception supports the summary judgment dismissal of plaintiff's Title VII sexual and racial discrimination claims); *Scharon v. St. Luke's Episcopal Presbyterian Hospitals*, 929 F.2d 360, 363 (8th Cir. 1991) (First Amendment bars Title VII sex discrimination claim brought by chaplain).

As the *Rayburn* court noted, the ministerial exception applies when the employee's "primary duties consist of teaching, spreading the faith, church governance, supervision of a religious order, or supervision or participation in religious ritual and worship." *Rayburn,* 772 F.2d at 1169. Indeed, the ministerial exception has been applied to prohibit a disability discrimination claim advanced by a choir director and an employment discrimination claim alleged by a church's press secretary/communication manager. *Starkman v. Evans*, 198 F.3d 173 (5th Cir. 1999), *cert. denied*, 531 U.S. 814 (2000) (choir director*); Alicea-Hernandez v. Catholic Bishop of Chicago,* 320 F.3d 698 (7th Cir. 2003) (press secretary).

Here, the trial court declined to decide whether Ms. Erdman's position qualified for the ministerial exception. RP 4. This Court,

however, may affirm summary judgment on any basis supported by the record. *Graff*, 113 Wn. App. at 802.

This record establishes that Ms. Erdman was a ministerial employee. Ms. Erdman was employed as the Church's Executive for Stewardship. CP 5, Supp. CP 811. Her primary job duties included facilitating the development of the vision, goals, and strategies for the Church; providing strategic leadership; helping to make decisions regarding the financial and development strategies and goals of the Church; and creating a major donor development plan for the Church. Supp. CP 811, 819-20. In her 2006 performance review, Dr. Toone summarized Ms. Erdman's contributions to the Church: "I am very grateful for your ministry" and "[I] believe that you are going to help lead us to the fulfillment of our mission." Supp. CP 811, 828.

In her response to the Defendants' summary judgment motion, Ms. Erdman argued that the ministerial exception did not apply because she functioned primarily as the Church's accountant. CP 570-71. This argument, however, ignored the primary job duties for the Executive for Stewardship position and the fundamental role that this job had in furthering the mission and goals of the Church.

In addition, Ms. Erdman also served as a key member of the Church's Executive Council (E.C.), which is the Church's highest level leadership team responsible for the strategic development and implementation of the Church's mission. Supp. CP 1044. The E.C. met at least weekly and was comprised of three lay women serving in executive

roles and one of the Church's two Associate Pastors. The majority of staff members, including some ministers, reported to the E.C., and every significant programmatic, ministry, outreach and administrative decision relating to the Church's ongoing mission was conceived, refined and executed by this team. Supp. CP 1044-45.

In her capacity as a member of the E.C., Ms. Erdman proposed a major revision to the Church's mission statement; participated in conversations and decisions about sermon topics; opined on the value or direction of particular ministries (such as the Church's pre-school, athletic program, women's ministry, small group program, children's department and youth ministry); objected that the Church's ministry to men was inadequate (which resulted in the development of the Church's "Men's Life" program); traveled to Guatemala to scout out a possible mission project for the Church; and led an all-Church Long Range Strategic planning process in which she recruited a consultant, wrote most of the materials, administered an all-church survey and focus groups. Supp. CP 1045. In addition, Ms. Erdman was one of the teachers in the Church's New Members classes and administered the Church's "Good Cents" ministry, which trained members how to manage their finances using biblical principles. *Id.* As the Executive for Stewardship and as a member of the Executive Council, Ms. Erdman was instrumental in the governance of the Church and in advancing the spiritual and pastoral mission of the Church.

Because the Executive for Stewardship position served the Church's spiritual and pastoral mission, the ministerial exception applies to Ms. Erdman's job. As a result, secular courts lack subject matter jurisdiction over Ms. Erdman's claims.

E. Ms. Erdman's Discrimination Claims Fail Because Washington's Law Against Discrimination Exempts Religious Organizations and her Challenge to the Constitutionality of the Exemption Is Fatally Flawed.

Under Washington's Law Against Discrimination ("WLAD"), it is an unfair practice for any employer: "To discriminate against any person in compensation or in other terms or conditions of employment because of age, sex, . . ." RCW 49.60.180(3). This section has been held to prohibit sexual harassment in employment. *DeWater v. State*, 130 Wn.2d 128, 134, 921 P.2d 1059 (1996).

The WLAD, however, excludes nonprofit religious organizations from its definition of employer:

> (3) "Employer" includes any person acting in the interest of an employer, directly or indirectly, who employs eight or more persons, and does not include any religious or sectarian organization not organized for private profit;

RCW 49.60.040(3).

Citing this definition of employer, the Washington Supreme Court held that nonprofit religious employers are exempt from all provisions of the WLAD. *Farnam v. CRISTA Ministries*, 116 Wn.2d 659, 673, 807 P.2d 830 (1991) ("If CRISTA is a nonprofit, religious organization, it is exempt from the provisions of this chapter [RCW 49.60]."). The *Farnam* court

even applied this exemption to a nursing home, because the nursing home's umbrella organization was a religious organization. *Id.* at 675-76. *See also MacDonald v. Grace Church Seattle,* 457 F.3d 1079, 1088 (9th Cir. 2006) ("[W]e read Washington State case law as exempting nonprofit religious employers . . . from sexual harassment and retaliation charges under the [WLAD]"); *City of Tacoma v. Franciscan Foundation*, 94 Wn. App. 663, 972 P.2d 566 (1999) (city's anti-discrimination ordinance, which defined "employer" to include religious nonprofit organizations, unenforceable against nonprofit religious organizations because it conflicted with WLAD).

Here, the Chapel Hill Presbyterian Church is a nonprofit, religious organization. Supp. CP 810. Because it is exempt from the WLAD, the trial court correctly ruled that Ms. Erdman's discrimination claims fail as a matter of law. CP 728, RP 3.

Ms. Erdman, however, contends that the religious exemption in the WLAD is unconstitutional. App. Brief at 3. Apparently, Ms. Erdman is asking this Court to declare the exemption in RCW 49.60.040(3) unconstitutional, and then apply the remainder of the WLAD to a nonprofit religious organization.

As discussed in the following sections, there are three problems with Ms. Erdman's position.

1. Ms. Erdman Has Failed To Serve the Attorney General as a Party Even Though She Claims RCW 49.60.040(3) Is Unconstitutional.

Whenever the constitutionality of a statute is called into question, the Attorney General must be served and be given an opportunity to be heard. RCW 7.24.110: *Kendall v. Douglas, Grant, Lincoln and Okanogan Counties Public Hosp. Dist. No. 6,* 118 Wn.2d 1, 11, 820 P.2d 497 (1991) ("Having challenged the constitutionality of the statute, they were required by RCW 7.24.110 to serve the Attorney General 'with a copy of the proceeding.'"). As the Washington Supreme Court has explained, "[t]he purpose of this provision is to protect the public" because "[t]he state is interested in the constitutionality of its statutes as they affect the public welfare." *Clark v. Seiber*, 49 Wn.2d 502, 503, 304 P.2d 708 (1956). Absent service on the Attorney General, the trial court lacks jurisdiction to hear the case. *Parr v. Seattle*, 197 Wash. 53, 84 P.2d (1938).

Here, Ms. Erdman has failed to serve the Attorney General. Thus, the trial court lacked jurisdiction to invalidate RCW 49.60.040(3) as unconstitutional.

2. This Court Cannot Strike the Exemption for Nonprofit Religious Organizations Without Declaring the Entire WLAD Unconstitutional.

What Ms. Erdman is asking this Court to do—namely, declare the exemption for nonprofit religious organizations unconstitutional and then apply the remainder of the Act to Chapel Hill—would broaden impermissibly the scope of the WLAD to cover a group that the legislature specifically excluded. Washington courts cannot do this without declaring

the entire WLAD to be unconstitutional. *See Mt. Hood Beverage Co. v. Constellation Brands, Inc.,* 149 Wn.2d 98, 118-19, 63 P.3d 779, (2003).

In *Mt. Hood Beverage Co.,* the Court explained that it cannot sever an unconstitutional clause:

> [If] to do so would broaden the statute's application, because we cannot presume the legislature meant it to be applied to persons it specifically excluded. City of Seattle v. State, 103 Wash.2d 663, 678, 694 P.2d 641 (1985); 16A Am.Jur.2d Constitutional Law § 218, at 109 (1998) (If "by striking out the proviso the remainder of the statute would have a broader scope either as to subject or territory, then the whole act is invalid.").

Mt. Hood Beverage Co., 149 Wn.2d at 118. In *Mt. Hood Beverage Co.,* the court did find the challenged exclusion to be unconstitutional and therefore declared the entire act to be invalid:

> Here, severing the exemption would require a group the legislature expressly excluded, in-state wine suppliers that produce over 300,000 gallons of wine annually, to be subject to the rights and responsibilities listed in RCW 19.126, thus broadening the statute's application. See RCW 19.126.020(3). We do not presume the legislature intended to include in-state wineries that meet this criterion. Therefore, we must strike RCW 19.126 in its entirety, as applied to wine distributors and suppliers and leave any amending of RCW 19.126 to the legislature

Mt. Hood Beverage Co., 149 Wn.2d at 118-19 (footnote omitted).

Even if this Court were to declare the exemption for religious organizations to be unconstitutional, the Court would have to declare the entire WLAD unconstitutional. Of course, if RCW 49.60 were to be

unconstitutional, then Ms. Erdman would have no claim based upon RCW 49.60.

3. Ms. Erdman's Constitutional Challenge to the Exemption in RCW 49.60.040(3) Fails as a Matter of Law.

A statute is presumed to be constitutional, and the party challenging the constitutionality of a statute must prove its unconstitutionality "beyond a reasonable doubt." *Island County v. State*, 135 Wn.2d 141, 146, 955 P.2d 377 (1998). Unless a court is "fully convinced" that a statute violates the constitution, it lacks the authority to override the statute. *Tunstall v. Bergeson*, 141 Wn.2d 201, 220, 5 P.3d 691 (2000), *cert. denied,* 532 U.S. 920, 121 S. Ct. 1356, 149 L.Ed.2d 286 (2001) (quoting *Island County,* 135 Wn.2d at 147).

In the absence of a suspect class or a fundamental right, courts apply the "rational basis" test to a legislative act. *Tunstall*, 141 Wn.2d at 226. This test provides that "'a statutory classification will be upheld if any conceivable state of facts reasonably justifies the classification.'" *Id.* (quoting *State v. Shawn P.,* 122 Wn.2d 553, 563-64, 859 P.2d 1220 (1993)).

Here, Ms. Erdman has failed to show how the exemption granted in RCW 49.60.040(3) implicates either a suspect class or a fundamental right. As a result, the rational basis test applies. The exemption in RCW 49.60.040(3) is justified because it avoids a potential violation of a church's First Amendment rights. For example, in the absence of the

exemption, the WLAD would require a Catholic church to employee female priests on an equal basis. Because the exemption furthers the constitutionally-required separation between church and state, the exemption passes the rational basis test and Ms. Erdman's constitutional challenge fails.

F. Separate Grounds Exist for Affirming the Dismissal of Ms. Erdman's Title VII claims.

Even if this Court rules that it has jurisdiction to hear Plaintiff's claims of sex and religious discrimination under Title VII, separate non-jurisdictional grounds exist to dismiss Plaintiff's claims.

Title VII states that it shall be an unlawful employment practice for an employer:

> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; . . .

42 U.S.C. § 2000e-2(a).

There is, however, no individual liability under Title VII. *Holly D. v. California Institute of Technology*, 339 F.3d 1158, 1179 (9th Cir. 2003) ("We have consistently held that Title VII does not provide a cause of action for damages against supervisors or fellow employees.") Thus, there is no liability for the individual Defendants in this case.

In addition, Ms. Erdman's religious discrimination claim cannot stand because there is an exception for religious organizations in Title VII. The exception states that Title VII will not apply to "a religious

corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities." 42 U.S.C. § 2000e-1(a). Thus, Ms. Erdman's religious discrimination claim must be dismissed as a matter of law.

G. If Allowed, Ms. Erdman's Discovery Requests into Internal Processes of the Investigative Committee Would Violate the First Amendment Rights of the Presbytery of Olympia.

When evaluating discovery requests into protected First Amendment activity, Washington courts typically employ a three-step process. First, the party subject to the discovery request "is only required to show *some probability* that the requested disclosure will harm its First Amendment rights." *Snedigar v. Hoddersen*, 114 Wn.2d 153, 159, 786 P.2d 781 (1990). If that standard is met, "the party seeking discovery must establish the relevancy and materiality of the information sought, and show that there are no reasonable alternative sources for the information." *Id.* If the party seeking discovery satisfies that burden, "the trial court must balance plaintiff's need for the information against the Party's claim of privilege and determine which is the strongest." *Id.* at 166.

In addition, the *Snedigar* court noted an in camera review of the documents at issue is appropriate when the trial court is faced with competing interests. *Id.* at 167. The court cautioned, however, that in

camera review "is *not* a course to be routinely undertaken in a First Amendment case." *Snedigar*, 114 Wn.2d at 167.

Here, Ms. Erdman sought discovery into the "internal process of the Presbytery." CP 78. Ms. Erdman also sought to depose the Rev. Jon Schmick[6] "to understand the breath [sic] and depth of the Presbytery's investigation." CP 273, *ll.* 12-13. The Presbytery of Olympia is not a party in this lawsuit.

In response to Ms. Erdman's subpoena, the Presbytery provided a "two-inch stack of documents," including "all documents gathered by the Investigative Committee, documents submitted by the parties, emails generated by the parties or relating to the underlying controversy, correspondence and other materials." CP 138. The Presbytery, however, withheld seven documents that "would reveal the thought process of the Committee." CP 139.

Following Ms. Erdman's motion to compel production of these documents, the trial court conducted an in camera review. The trial court then issued an order denying the motion to compel because the documents contained evidence of the thought process of the Investigative Committee that was protected by the First Amendment and because the documents

---

6 Rev. Schmick was the chair of the Investigative Committee of the Presbytery of Olympia. Supp. CP 923. While the Defendants initially listed Rev. Schmick as a witness, they did so primarily because his testimony might be necessary to authenticate documentary evidence at trial. Because Rev. Schmick's authentication was no longer necessary, the Defendants submitted a declaration stating that they would not call the Rev. Schmick at trial. Supp. CP 1032.

"show that the Presbytery considered each accusation lodged by plaintiff" in her Form 26 grievance. CP 180. Because the Plaintiff had not satisfied her burden of showing the "requisite necessity," and because the documents were protected by the First Amendment, the trial court denied the motion to compel. CP 180.

Consistent with this order, the trial court subsequently ordered that Rev. Schmick be deposed, but that there be "no inquiry regarding the thought processes of the Investigative Committee." CP 645. The trial court's discovery rulings, and the process by which the court resolved the discovery dispute, are consistent with *Snedigar.*

In addition, the trial court's discovery rulings should be affirmed because the intrusive discovery sought by Ms. Erdman would violate the First Amendment rights of the Presbytery. In *Milivojevich*, for example, the Supreme Court held that an inquiry into the arbitrariness of a religious tribunal is "exactly the inquiry that the First Amendment prohibits" because "religious controversies are not the proper subject of civil court inquiry. *Milivojevich,* 426 U.S. at 713.

Applying *Milivojevich*, several courts have warned of the excessive entanglement that might occur in the discovery process. For example, the Fourth Circuit stated:

> A Title VII action is potentially a lengthy proceeding, involving state agencies and commissions, the EEOC, the federal trial courts and courts of appeal. **Church personnel and records would inevitably become subject to subpoena, discovery, cross-examination, the full panoply of legal process designed to probe the mind of**

> **the church in the selection of its ministers.** . . . There is the danger that churches, wary of EEOC or judicial review of their decisions, might make them with an eye to avoiding litigation or bureaucratic entanglement rather than upon the basis of their own personal and doctrinal assessments of who would best serve the pastoral needs of their members.

Rayburn, 772 F.2d at 1171

Similarly, the D.C. Circuit held that "extensive pre-trial inquiries" and a lengthy EEOC investigation "constituted an impermissible entanglement with judgments that fell within the exclusive province" of a church. *E.E.O.C. v. Catholic University of America*, 83 F.3d 455, 466 (DC Cir. 1996). Thus, the court upheld the summary judgment dismissal of a plaintiff's sex discrimination claim under the Establishment Clause. *Id.*

Furthermore, a church's motives in internal decisions concerning ministerial employees are irrelevant. *See Bell v. Presbyterian Church (U.S.A.)*, 126 F.3d 328 (4th Cir. 1997). In *Bell*, the court refused to consider whether a church's motives in terminating an employee were improper:

> While it is possible that the Presbyterian Church may have harbored hostility against Bell personally, it is also possible that the church may have been acting in good faith to fulfill its discernment of the divine will for its ministry. Resolution of such an accusation would interpose the judiciary into the Presbyterian Church's decisions, as well as the decisions of the other constituent churches, relating to how and by whom they spread their message and specifically their decision to select their outreach ministry through the granting or withholding of funds.

Bell, 126 F.3d at 332. Because the decision to terminate Bell involved an ecclesiastical dispute beyond the ken of civil courts, the *Bell* court affirmed the trial court's dismissal for lack of jurisdiction. *Id.* at 331-32.

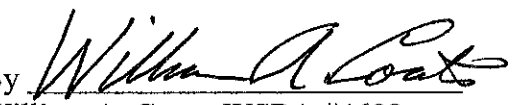
If permitted, Ms. Erdman's inquiry into the internal workings of the Investigative Committee would violate the First Amendment rights of the Presbytery under *Milivojevich*, *Bell*, *Rayburn*, *E.E.O.C. v. Catholic University of America*, and *Snedigar*. Because the trial court's discovery rulings were neither manifestly unreasonable nor based on untenable grounds, the trial court did not abuse its discretion. For these reasons, the trial court's discovery rulings should be affirmed.

VI. CONCLUSION

For the above reasons, Respondents request that this Court affirm the summary judgment dismissal of Plaintiff's claims.

RESPECTFULLY SUBMITTED this 2nd day of November, 2009.

VANDEBERG JOHNSON & GANDARA, LLP

By 
William A. Coats, WSBA #4608
Daniel C. Montopoli, WSBA #26217
Attorneys for Respondents

No. 83037-1
(on appeal from Pierce County Cause No. 08 2 09228 9)

SUPREME COURT OF THE STATE OF WASHINGTON

ANGELA ERDMAN,

Plaintiff/Appellant,

v.

CHAPEL HILL PRESBYTERIAN CHURCH; MARK J. TOONE, individually; and the marital community of MARK J. TOONE and "JANE DOE" TOONE,

Defendants/Respondents.

DECLARATION OF SERVICE

Vandeberg Johnson &
Gandara, LLP

William A. Coats, WSBA #4608
Daniel C. Montopoli, WSBA #26217
Attorneys for Respondents
1201 Pacific Avenue, Suite 1900
P. O. Box 1315
Tacoma, WA 98401-1315
(253) 383-3791

I hereby certify under penalty of perjury under the laws of the State of Washington, that the foregoing is true and correct:

That on November 2, 2009, I caused to be delivered a true and correct copy of Brief of Respondents to counsel for Appellant:

Sean V. Small
Robin Williams Phillips
Attorneys at Law
Lasher Holzapfel Sperry & Ebberson, PLLC
2600 Two Union Square
601 Union Street
Seattle, WA 98101-4000

via electronic mail and legal messenger.

DATED this 2nd day of November, 2009, at Tacoma, Washington.

Mark L. Gannett

MARK L. GANNETT